

AUSTRALIA'S RIGHT TO KNOW

SUBMISSION TO THE NSW PARLIAMENTARY COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION: THE PROTECTION OF PUBLIC SECTOR WHISTLEBLOWERS

Committee on the Independent Commission Against Corruption
Parliament House
Macquarie St
Sydney NSW 2000

Summary

Australia's Right to Know (RTK) coalition believes the public have a right to know how they are being governed and in particular, a right to be informed about potential corruption or maladministration in government.

The coalition appreciates that public servants serve the public through serving elected representatives. However, at times, there may be conflict between that duty and the delivery of good government.

As the people closest to the machinery and administration of government, cases of maladministration or corruption are often discovered by public servants. Internal channels may not always be an appropriate or effective mechanism of addressing such issues. Exposure to the media may be the only or most effective means to inform the public and influence a positive outcome.

- RTK submits that section 19 of the *Protected Disclosures Act 1994* (the Act) should be amended to permit a public servant, in certain circumstances to make a disclosure directly to the media without the need to first pursue official channels;
- As an adjunct, a journalist appearing before a NSW court or the Independent Commission Against Corruption (ICAC), should not be compelled to disclose the identity of a confidential source, unless the Court or ICAC is satisfied it is necessary to do so. A whistleblower may be discouraged from making disclosures that might reasonable by considered in the public interest unless a journalist is able to maintain confidentiality of their sources.



Introduction

Australian's Right to Know (RTK) is a coalition of 12 major media organisations formed in 2007 to address concerns about the state of freedom of speech in Australia including the public's access to information on how they are governed.

RTK believes the public has the right to be informed about the administration of government programs and policies. The public should have access to government information except where disclosure is not in the public interest; for example to protect the privacy of individuals, to protect national security or to protect cabinet confidentiality.

The public interest is serviced by exposing maladministration or corruption within the public service. The public interest overrides any embarrassment or other backlash against the government.

The potential penalties for public service whistleblowers for breaching secrecy or confidentiality are severe and a whistleblower may also suffer consequences including victimisation in the workplace and flow-on effects to their personal lives.

Whistleblowers need to be protected from retribution for their actions and as people will place to identify improper activity they should be encouraged to expose problems by having a range of mechanisms that allow public servants to bring issues to light.

Ability to disclose to the media

The media, which brings issues of public interest to the public's attention, is often the only or most effective way for a whistleblower to expose wrongdoings within government or its administration.

There are a number of examples to demonstrate that governments often only become aware of, or act on allegations made by whistleblowers once they have been aired in the media.

Two recent examples are relevant here:

- In 2005 *The Australian* published reports of Customs Officer Allan Kessing on lax airport security, after the reports had been ignored by his superiors. Only after the reports became public knowledge, was a \$100 million program put in place to improve security.

Allan Kessing was convicted of disclosing official information without authority. RTK believes Kessing should not have been prosecuted. He acted in the public interest to protect public safety and national security.

- Queensland nurse Toni Hoffman, had raised concerns about malpractice by Dr Patel with the police, the Queensland Coroner and her employer. Action was not taken and the matter was eventually raised with a Member of Parliament and the media. The problems were brought to the attention of the public and Dr Patel was charged and extradited back to Australia. If she had gone to the media in the first place, immediate action could have been taken to address the danger to the health and safety of the Queensland public.

Although these incidents did not occur in NSW, RTK believes these examples demonstrate that whistleblowing to the media is in the public interest and a whistleblower should not necessarily be required to pursue official channels within the government before resorting to the media, particularly in cases where non-disclosure risks endangering the public.

Section 19 of the *Protected Disclosures Act 1994*

NSW is the only Australian jurisdiction that enables a whistleblower to disclose to the media and receive protection.

While section 19 permits disclosures to journalists, it restricts the circumstances in which such disclosures may be made.

Firstly, the section only provides protection for a whistleblower who discloses to a journalist where he or she has first disclosed through official channels.

In both of the examples cited above, if they had occurred in NSW the whistleblower would have been required to go through official channels before going to the media and hence the problems may not have been brought to light in a reasonable time.

Under the conditions in sub-section 19(3), a whistleblower is stopped from disclosing to the media for six months after they have made original disclosure through official channels. Even if the person to whom the whistleblower discloses the problem does not investigate the allegation, the whistleblower is not able to resort to the media for six months.

There is Parliamentary precedent in the Commonwealth arena for a recommendation for disclosure to the media by whistleblowers. In 1994 the Senate Select Committee on Public Interest accepted there were circumstances in which a person disclosing to the media without following a procedure should be protected. The Committee recommended that whistleblowing to the media should be permitted where it is excusable in the circumstances". Factors that should be taken into account in deciding if such an action is excusable include the seriousness of the allegations, reasonable belief in their accuracy and reasonable belief that going through official channels might be futile or result in victimisations.

Secondly, section 19 provides that the whistleblower must have reasonable grounds for believing that the disclosure is substantially true and also the disclosure must be substantially true. RTK is of the view the requirement the disclosure must be true should not be a determining factor in whether protection is available and may act as a disincentive for whistleblowers to come forward and disclose information that should be in the public arena. Given that it may be difficult for a whistleblower to prove the facts in a Court, provided the whistleblower has reasonable belief in the truth of the allegation, he or she should be entitled to protection.

RTK position

Where a public servant makes a disclosure through official channels, he or she should be protected where he or she honestly believes, on reasonable grounds, that it is in the public interest that the material be disclosed and honestly believes, on reasonable grounds that the material is substantially true.

Further, legislation should permit a public servant, in certain circumstances to make a disclosure directly to the media without the need to first pursue official channels.

However, RTK recognises that disclosure to the media which bypass official channels warrants a higher threshold test than that which should apply to disclosures through official channels.

For example, a disclosure made directly to the media could be protected where:

- (a) the employee honestly believes, on reasonable grounds, that it is in the public interest that the material be disclosed;
- (b) the employee honestly believes, on reasonable grounds that the material is substantially true; and
- (c) the employee honestly believes on reasonable grounds either that:
 - i. to make the disclosure through internal channels is likely to be futile or result in the whistleblower (or any other person) being victimised; or
 - ii. the disclosure is of such a serious nature that it should be brought to the immediate attention of the public.

RTK submits that in addition to protection for disclosing directly to the media in certain circumstances, there should be legislative protection for a public servant to make a disclosure to the media after disclosure through official channels has proved unsuccessful. However, we believe the six month period set out in the NSW legislation is too long and should be reduced to say two months.

Journalists' sources

When a whistleblower discloses information to the media, there may also be legal and other consequences for the journalist to whom the disclosure is made.

Consequently, as an adjunct to protection for the whistleblower, RTK recommends robust protection for a journalist to protect the identity of his or her source in appropriate cases.

The potential consequence of a lack of effective protection combined with the determination by some authorities to track down the source of disclosures (as seen last year by the raid by police of the offices of Western Australia's *Sunday Times*) discourages a whistleblower both initially coming forward and, in cases of inadequate or improper handling of an internal disclosure, from disclosing that to a journalist.

Adequate protection against requiring a journalist to reveal their source should be available in both NSW courts and when a journalist is compelled to give evidence before the ICAC.

RTK believes the current provisions relating to journalists appearing before the courts contained in the NSW *Evidence Act 1995* are inadequate and there is currently no protection for journalists appearing before ICAC.

Part 3.10 Division 1A of the NSW *Evidence Act 1995* (the Act) seeks to give the Court a discretionary power to protect a confidential communication including a communication between a journalist and a source. The legislation is inadequate, as it requires a journalist to reveal the identity of a source, unless a court is satisfied otherwise. Further, the legislation restricts the circumstances in which the court may exercise its discretion. Journalists who refuse to disclose such information can be charged with contempt, fined or imprisoned.

The State and Commonwealth Attorneys General are currently considering amendments to the model journalists' sources protection provisions which have been enacted in the Commonwealth and NSW Evidence Acts.

RTK believes the new proposed model could be strengthened further. Recognising the important role the media plays in freedom of speech, the law should start from the position that a court or ICAC should not require a journalist to disclose the identity of a source. This presumption should only be reversed on limited grounds of compelling public interest, for example to protect national or international security or to prevent a serious crime.

Nevertheless, the new proposals recognise the importance of media freedom to report on issues of public interest, and removes the existing rule that prevents a Judge from exercising his or her discretion if disclosure of the information they have received amounted to a crime. The proposed changes would enable a Judge to excuse a journalist from revealing a source in most circumstances. RTK is of the view the proposals are a considerable improvement on the current model and supports them.